In the Matter of:	
ERNESTO RODRIGUEZ, Claimant	**Date Issued: May 4, 1999** **Case No. 1998-LHC-407**
v.	**OWCP No. 8-113168**
CERES GULF, INC., Employer	
and	
CERES GULF, INC., C/O THE SCHAFFER COMPANIES Carrier	

APPEARANCES:

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For Claimant

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For ILA

BEFORE: JAMES W. KERR, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (the "Act") and the regulations promulgated thereunder. This claim is brought by Ernesto Rodriguez, Claimant, against his former employer, Ceres Gulf, Inc., Employer, and its insurance carrier, Ceres Gulf, Inc., C/O The Schaffer Companies, Carrier. A hearing was held in Galveston, Texas on August 25, 1998 at which time the parties were represented by counsel and given the opportunity to offer testimony and documentary evidence and to make oral argument. The following exhibits were received into evidence:

1) Court's Exhibit No. 1;

2) Claimant's Exhibits Nos. 1-12; 14-17; 19, 20, 22-24; and

3) Employer's Exhibits Nos. 1-20; 22-38.[1]

Upon conclusion of the hearing, the record remained open for submission of written closing arguments which were received by both parties. This decision is being rendered after having given full consideration to the entire record.

Stipulations

After evaluation of the entire record, the Court finds sufficient evidence to support the following stipulations:

(1) That an injury/accident allegedly occurred on June 27, 1997;

(2) That the fact of the injury/accident is disputed;

(3) That there was an employer/employee relationship existing at the time of the alleged injury;

(4) That the alleged injury arose in the course and within the scope of employment;

(5) That the date the Employer was notified of the injury was June 27, 1997;

(6) That the date of notification of the injury/death pursuant to Section 12 of the Act to Employer was June 27, 1997 and to the Secretary of Labor was July 2, 1997;

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[1] The following abbreviations will be used in citations to the record: CTX - Court's Exhibit, CX - Claimant's Exhibit, RX - Employer's Exhibit, and TR - Transcript of the Proceedings.

(7) That an informal conference was held on October 30, 1997;

(8) That Employer paid temporary total disability for the period of June 28, 1997 through August 22, 1997 of $6,408.48;

(9) That the Notice of Controversion was filed on September 11, 1997; and

(10) That Claimant's average weekly wage was $1,212.25.

Issues

The unresolved issues in this proceeding are intoxication, MMI, nature and extent of disability, Section 7 medical benefits, and 8(f) relief.

Summary of the Evidence

Testimonial Evidence

Robert Lee Harrison

Robert Harrison, a member of ILA Local 24, testified that he has worked as a longshoreman for twenty-five years and holds currently a seniority classification number of Position 19. Mr. Harrison stated that he has been a certified truck driver since 1991 and is a member of the truck driving board. Mr. Harrison testified that he works frequently with Claimant.. TR 23-25.

Mr. Harrison testified that Claimant was working with him and a spotter on June 27, 1997, the day of Claimant's accident, loading and unloading containers using a Paceco crane. He stated that Claimant was driving in front of him for the majority of the day. Mr. Harrison testified that he spoke with Claimant on the morning of the accident and Claimant spoke clearly and exhibited no unusual behavior. He stated that Claimant appeared neither intoxicated nor under the influence of any medication or drug. TR 25-30.

Mr. Harrison testified that on July 27, 1997 he witnessed Claimant slip and "kind of twist as he hit the ground" as he exited the rear of his truck using a small step. He stated that this was not an unusual occurrence as "we usually slip coming out of there." Mr. Harrison opined that Claimant may have slipped on oil or other residue on the narrow step located on the fuel tank. He stated that Claimant could not have tripped over "his own two feet" because you must "come down one foot at a time." Mr. Harrison testified that Claimant then left to get water, returned, entered his truck, and pulled under the crane. He stated that Claimant did not waver or stumble and exhibited no difficulty in positioning his vehicle under the crane. Mr. Harrison added that the positioning left little margin for error and Claimant would not have been able to perform this function if he were incapacitated by drugs or alcohol. Mr. Harrison testified that Claimant exhibited no difficulty in performing his job duties either before or after the accident and injury. He stated that after returning from lunch Claimant asked if he remembered the accident and related that when he went home for lunch his wife

gave him "two Tylenol, those real strong ones." Mr. Harrison testified that during that conversation which took place at approximately two-thirty, Claimant did not appear intoxicated or incapacitated in any manner. Mr. Harrison stated that although he has never personally encountered an intoxicated truck driver, he was aware that drivers have been intercepted when they were driving poorly. TR 30-33, 35-37, 43-46.

Mr. Harrison testified that since his accident, Claimant has not availed himself of jobs that he would have prior to his accident. He stated that Claimant left work several times because of back pain. Mr. Harrison testified that the drivers were not allowed breaks, and that if Claimant pulled his truck out of line to stretch for five or ten minutes the foreman would "cut him off" and call for a replacement. He stated that some of the trucks are very "rough riding" as they do not have springs or shock absorbers under the back. Mr. Harrison testified that, although he has never had a back injury, his back is sore at the end of the day. He stated that he worked at night and usually secured work four nights a week. Mr. Harrison testified that he worked as many as 13 hours a day driving. TR 38-41, 44.

Mr. Harrison testified that neither the superintendent, Mr. Tollefson, nor the walking foreman, Mr. Buckley, nor any other company representative questioned him concerning whether Claimant was intoxicated or under the influence of drugs at the time of the accident. Mr. Harrison stated that Claimant never appeared at work under the influence of alcohol or drugs. He testified that Claimant's reputation at the Union Hall is "good, far as I know. It's perfect as far as when I'm working with him." TR 33, 34, 36.

Mr. Harrison testified that the trailers on the trucks are forty feet and there is about one and one half feet from the front bumper of the cab to the driver's seat. He added that about five to ten feet separate the trucks while in line to receive a container. TR 46.

Jesse Leon Revis

Jesse Revis, president of International Longshoremen of Houston Union at the Port of Houston, Local 24, testified that he oversees day-to-day union operations and had worked in all capacities as a longshoreman. Mr. Revis stated that Claimant's section, section 23, included approximately 35 or 40 people. Mr. Revis testified that an individual moved to a higher section based on hours worked with 700 hours necessary to advance to the next section.[2] He explained that each longshoreman seeking employment through Local 24 had a work card with his name, picture, and number included. Mr. Revis testified that the longshoremen arrive daily at the union office and stand in their section as hiring foremen walked through the sections offering jobs. He stated that job codes were posted daily on a chalkboard and knowledge of the physical demands of each job came primarily from experience. TR 48, 51-55.

[2]Mr. Revis testified that either 1,000; 1,400; or 1,800 hours are needed to qualify for the three available insurance packages. TR 55.

Mr. Revis testified that Claimant is a member of the Local's 140 member designated driver board, one of ten specialty boards. He explained that members of the board are given job assignments in rotation. Mr. Revis stated that a union member is allowed to be on only one specialty board and, therefore, Claimant could only procure other work by standing in his section waiting for a foreman to offer work. Mr. Revis testified that most of the jobs offered to section 23 personnel are on the vessel itself where they're tying down and lashing and unlashing containers. TR 56, 57, 59, 60.

Mr. Revis testified that he had never had complaints concerning Claimant's work, and if there were complaints concerning longshoremen they were usually sent to him. Mr. Revis stated that prior to Claimant's injury he did all types of longshore work in addition to his driving. He testified that of the jobs Claimant worked most were physical. The worker either started in the hole of the ship securing cargo with tools, or worked on the lift truck, or acted as a hook-on man. Mr. Revis stated that there were no longer any light-duty jobs on the waterfront. He added that only a winchman or a flagman would not have to lift over 25 pounds repetitiously throughout the day, although under current union contracts individuals in those positions must be able to function in positions where physical work is involved. Mr. Revis stated that the current contract, executed in 1996, includes a flexibility clause where the employers are able to utilize personnel hired for one job in other jobs where more physical work is included. Mr. Revis stated that there were no jobs, other than driving, available for Claimant if his doctor mandated restrictions disallowing lifting of more than twenty-five pounds on a regular basis and sixty pounds occasionally He testified that of Claimant's 2,449.75 hours worked in a year, 1300 were for driving with the remaining approximately 1,100 being for various jobs on the docks. Mr. Revis stated that since Claimant's return to work on June 29, 1998, all of his jobs excluding one, a general cargo job, were for driving. TR 62-66, 77-79; RX-22, CX-23.

Mr. Revis testified that job classification 100 where Claimant had previously worked 300 hours required physical agility and ability to lift objects up to 100 pounds or more. He stated that if an individual is physically impaired, he cannot work in the hold of a vessel. Mr. Revis testified that classification 127, securing with tools, requires moving cargo around and exerting pressure to lock down the cargo. He stated that classification 126, lashing and securing without tools is a very physical job. Mr. Revis testified that classification 107, hook on man, required lifting gear to hook and unhook it. He added that the position of automobile driver entailed more than driving autos off trucks because the driver must walk up as many as twelve deck ramps to reach the automobiles. Mr. Revis stated that there were jobs driving forklifts, lift trucks, or tractor trucks but that even those involved alighting to assist in hooking cargo. He explained that drivers cannot refuse to assist due to doctor's restrictions because anyone who cannot meet the physical requirements cannot be referred for the job. Mr. Revis testified that a flagman must stand in the same position and use his arms and hands to signal. He added that a flagman is not allowed to sit and rest. Mr. Revis stated that there are no rest breaks incorporated into the work day other than a lunch hour. Mr. Revis testified that although the union has no standardized forms stating job requirements he has personal knowledge of the requirements from his many years of experience on the waterfront. He restated that there were no light-duty jobs available on the waterfront. TR 79-85.

Mr. Revis testified that he was aware that Claimant tested positive on a drug urine test taken in connection with his July 1997 accident. Mr. Revis opined that an individual who believed he had

wrongfully failed a drug test could request a retest, but did not know whether Claimant had made such a request. He stated that since 1990 such a test is mandatory when there is an accident on the waterfront. Mr. Revis testified that only positive tests are relayed to the union and West Gulf Maritime Association requests that that individual be suspended from referral by the local. He stated that union members are also subjected to periodic, random drug testing and Claimant had never tested positive. He stated that although Claimant had four or five injuries which required drug testing, he had never previously tested positive for drugs. Mr. Revis testified that upon receipt of the suspension from West Gulf Maritime Association, the union asked Claimant if he would like to file a grievance. He stated that Claimant did file a grievance and union officials went to the job site and investigated including consulting a toxicologist. Mr. Revis testified that the union financial secretary and the first vice president handled the grievance on behalf of the union with the vice president consulting the toxicologist. Mr. Revis stated that he did not know why the toxicologist did not testify at the grievance hearing. He stated that there may or may not be a copy of the grievance in Claimant's union file as the union does not always receive a copy of the grievance from West Gulf Maritime Association. Mr. Revis testified that if there was a grievance proceeding, Claimant's file would contain a copy. TR 66-69, 87, 88; CX-3.

Mr. Revis testified that no one from Respondent's office called to complain about Claimant's job performance on the day of the accident. He stated that there were no complaints in Claimant's personnel file for that day or any other day concerning possible intoxication or incapacity. Mr. Revis testified that although Claimant was denied work opportunities by Respondent this was not a complaint as related to the complaint forms in use by the union. TR 74, 85, 86.

Mr. Revis testified that if a longshoreman complained of another longshoreman's performance related to possible drug usage, the union speaks with the individual personally and confidentially and offers assistance in resolving the problem. He stated that no one had ever indicated that Claimant had a drug problem. Mr. Revis testified that there were individuals who were removed from the job for intoxication. TR 71, 77.

Mr. Revis testified that the appearance of prescription drugs in a drug test are exempted and, therefore, do not constitute a positive. He testified that the prescription medication for which Claimant tested positive would be exempted. Mr. Revis stated that it is not the intent of the union to have longshoremen subjected to penalties for taking prescription drugs prescribed for their spouses. He testified that it was his understanding that the medication Claimant tested positive for on June 27, 1997 was prescribed for his wife. Mr. Revis stated that there were longshoremen who tested positive for drugs in the last one-year period but he did not know the number. TR 72, 73, 86, 89, 90.

Mr. Revis testified that a videotape presented depicted accurately a driver's job such as that Claimant performed on June 27, 1997. He added that it also depicted the Paceco crane and the maneuvering that a driver must undertake to position the vehicle properly to receive a container. Mr. Revis testified that if a driver was intoxicated it would be evident because he must be focused and have all his senses operating to perform the necessary maneuvers. He stated that the containers must often be dropped in or retrieved from very tight locations with people circulating constantly which

mandates constant attention to ensure that no one is in a dangerous location. Mr. Revis testified that if a driver were intoxicated he may be able to perform his job, but the intoxication would probably be noticed. He stated that on June 27, 1997 a flagman, a gang foreman, a ship foreman, a clerk, and a checker instructed and observed Claimant over the course of the day. Mr. Revis testified that none of the aforementioned personnel made a complaint either to the union or the stevedoring company concerning Claimant's job performance on that day. TR 75, 76, 92-94.

Esteban Garza

Esteban Garza, a longshoreman and member of ILA Local 24, testified that he worked with Claimant for twenty-five years. Mr. Garza stated that he currently was a member of the Paceco board operating a crane of the same name, but previously was a member of the driving board for twenty years. He testified that on June 27, 1997 he was operating the crane and spoke with Claimant before they began work that day and did not notice anything that would denote intoxication or incapacitation. Mr. Garza stated that in his capacity he both loaded and unloaded containers and sometimes encountered drivers who had difficulty aligning properly to receive the containers. He testified that when such a problem arose, he would call either the checker or walker foreman by radio to inform the driver that he was not properly positioned. Mr. Garza stated that he encountered no difficulty with Claimant on June 27, 1997 between 7:00 a.m. and 10:30 a.m. and would have noticed because Claimant was always an excellent driver.[3] He added that he did not hear anyone complain about Claimant's functioning at any time during that day. He testified that he averages thirty to thirty-five container moves per hour, but if a driver has difficulty aligning it reduces his moves per hour. He added that the margin of error is less than two to three inches. Mr. Garza stated that the union tracks the number of moves and if the number is reduced below the average then they investigate to determine the cause of the reduction. He added that the walking foreman and the foreman position themselves directly beneath the crane most of the day. Mr. Garza testified that if Claimant was having difficulty executing there were several supervisors there to notice. He stated that on June 27, 1997 he had six drivers working with him on the job. Mr. Garza testified that he did not witness Claimant's accident, but had himself previously slipped and fallen from the same type step as did other drivers. TR 96-105, 110, 113, 114.

Mr. Garza testified that prior to Claimant's injury he took jobs on the ships which included loading and securing containers with fifty to one hundred and thirty pound rods and securing the bottoms with turnbuckles weighing about thirty pounds. He testified that prior to Claimant's accident he was not aware of his refusing a job because it was too physically demanding. Mr. Garza testified that although he had experienced other longshoremen quit jobs because they were too physically demanding, he had never seen Claimant do so prior to his accident. He stated that since Claimant's return post injury he has consistently complained of back pain and has turned down jobs because "he just cannot handle it." Mr. Garza testified that with his and Claimant's seniority number of 23, they can work almost every day if able to do the more physically demanding jobs. TR 105-109.

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[3]Mr. Garza testified that although he did not begin work until 1:00 p.m., but was there at 7:00 a.m. to make sure the man on the early shift arrived. TR 111.

William Buckley

William Buckley, a longshoreman with a seniority number of thirty-three, testified that he worked as a walking foreman for Respondent for the past two or three years. He stated that he also works as a gang foreman and takes rigging jobs at Barbers Cut which "pays the biggest money." Mr. Buckley testified that the rigging jobs, which are physically demanding, paid $23.00 straight time and $35.50 overtime whereas the same job in town pays only $14.00. TR 115-118.

Mr. Buckley testified that he was a walking foreman for Respondent on June 27, 1997, John Tollefson was the superintendent, and S.J. (Sip) Hines was the gang foreman. He stated that as walking foreman he is the hands on supervisor from the ILA local on the job. Mr. Buckley testified that he works first on the dock and then boards the ship. He stated that the gang foreman supervises and instructs the drivers in the crane area and with the aid of a spotter tells the drivers precisely where to stop. Mr. Buckley testified that if the driver is misaligned to receive a container the crane operator usually complains and he goes out to investigate. He stated that the on June 27, 1997 he did not receive any complaints from the crane operators or anyone else concerning Claimant. Mr. Buckley added that another driver working with Claimant on that date, Mr. Boyce, nicknamed "Crybaby Boyce", is very vocal if there is a problem but did not complain about Claimant's functioning. TR 119-123.

Mr. Buckley testified that he routinely spoke to his drivers before they began work and noted if any "trouble makers" were included. He stated that on June 27 all of the drivers were good. Mr. Buckley testified that he had no problems with Claimant's performance on at least the two occasions prior to his injury when he worked for Respondent. TR 124, 125.

Mr. Buckley testified that prior to the drug testing program there were problems with longshoremen showing up for work intoxicated or under the influence of drugs. He stated that there was nothing in Claimant's job performance that indicated that he was under the influence of any medication or drugs on June 27, 1997. Mr. Buckley testified that Mr. Hines, the gang foreman on that day, did not indicate to him that Claimant performed poorly. He added that no one in yard operations, including the operator of the straddle crane which loads containers on the trucks and the checker, complained of Claimant's performance on June 27, 1997. Mr. Hines testified that the gear man who signs out the trucks to the drivers would report to him and then the superintendent if he suspected anyone of being under the influence of drugs or alcohol because the gear men are very protective of the vehicles. TR 125-129.

Mr. Buckley testified that it was not unusual for a longshoreman to report an on the job injury and remain on duty because if they leave they are off the payroll for that day. Mr. Buckley stated that if anyone suspected that Claimant's accident was drug or alcohol related John Tollefson would have fired him immediately. He testified that Mr. Tollefson did not tell him at any time on June 27, 1997 that Claimant was possibly intoxicated or incapacitated. TR 130, 131.

Ernest B. Rodriguez

Ernesto Rodriguez, a member of ILA Local 24, testified that he has been employed as a longshoreman in Houston for twenty-five years, has a seniority number of 23, and has worked as a truck driver for seven years. Claimant stated that he is a member of the drivers specialty board. TR 135.

Claimant testified that he undergoes regular physicals and urine drug testing as a result of his status as a driver. He stated that he had never tested positive to a drug test prior to his accident/injury of June 27, 1997. Claimant testified that he had incurred other on the job injuries and had never tested positive in a related drug test. TR 136, 137; CX-23.

Claimant testified that on June 27, 1997 he arrived at work at 7 a.m. He stated that he learned that he would be working that day when he listened to a recorded message on the Union phone system which stated that drivers should report to a certain dock location. Claimant testified that as usual he called at 5:30 a.m. on June 27, 1997 to submit that he would be there that morning. He stated that he did not go to the union hall that morning but proceeded directly to the dock passing by the gate guard at the Port of Houston. Claimant testified that the guard did not stop him for erratic driving. Claimant stated that he then went to Respondent's yard and signed out a truck with Leland Kuykendall, a regular employee of Respondent. He testified that he then drove down the main road to the job site encountering truck and container traffic. Claimant testified that when he arrived at the site he reported to the gang foreman to receive his work order and then lined up. He stated that no one questioned his physical or mental ability to perform his job when he reported to work on June 27, 1997. Claimant testified that Mr. Harrison was behind him in the rotation most of the morning that day. TR 137-145.

Claimant testified that he was involved in an accident and injury on June 27, 1997. He stated that as he exited the vehicle from the rear, he tripped and fell into a wall twisting his back. Claimant testified that the driver behind him honked and he waved but did not speak to the driver. He stated that he told the foreman about the accident and the foreman said that he would report it.. Claimant testified that he believed almost immediately that he had injured his back because he experienced a sharp pain in his back which was not there previously, but he wanted to remain on the job. He stated that he did not immediately inform the foreman of the pain in his back. Claimant testified that the foreman told him that they were going to work through the job which would entail overtime and stated that it was up to him (Claimant) if he wanted to remain. He stated that he remained to make the overtime pay. He added that the foreman advised him to "get a ticket" or just notify the office of the accident. TR 145-148.

Claimant testified that he did not really know what caused him to slip. He stated that after the accident he proceeded to get a drink of water and stood in front of his truck and watched an operator having difficulty in placing a container in the hold. Claimant testified that as the operator placed the container on the truck in front of him, he returned to his vehicle and pulled up to receive his container. He stated that he had no difficulty loading and unloading the container irrespective of

the pain in his back. Claimant testified that no one complained of his performance at that juncture. TR 148, 149.

Claimant testified that at lunch he notified the superintendent John Tollefson that he had fallen from his truck that morning. Mr. Tollefson told him that he was aware of the accident and inquired if he were going to return after lunch. Claimant stated that he informed Mr. Tollefson that he was going home for lunch and would try to return. He added that by that time he had a sharp pain in his back which traveled down his leg. Claimant testified that he wanted to return to work and asked his wife for something for pain. He stated that she gave him a couple of pills which did alleviate his pain temporarily but did not impair his judgment or his ability to perform his job. Claimant stated that he returned to the dock using the same procedure as he did that morning. He stated that about 2:30 p.m. that afternoon he spoke with the driver behind him, Mr. Harrison, and told him that he had not gotten a ticket but had gone home and taken pain medicine. He added that he told Mr. Harrison that he may get a ticket and, if he did, Mr. Harrison would be his witness. He stated that no one including the crane operator, the gang foreman, the walking foreman, or the superintendent complained about his performance that afternoon. TR 150-153.

Claimant testified that around 5 p.m. that day he was standing near the crane and the gang foreman approached him and stated that if he were going to get a ticket he better do so now because the papers are removed from the dock office and they are going to instruct you to get a drug test. He stated that he then went to the office and told John Tollefson that he was going to get a ticket. Claimant testified that when Mr. Tollefson appeared upset, he explained that he was not leaving he was just getting an accident ticket. Claimant stated that Mr. Tollefson then told him to unload his container and park his truck and meet him at the dock. Claimant testified that he told Mr. Tollefson that he did not want to quit and Mr. Tollefson told him to do what he had instructed. He stated that Mr. Tollefson filled out the accident report which he (Claimant) then signed. Claimant testified that he neither filled out nor signed the notice for drug test form. He stated that he was given a form to bring to the doctor. Claimant testified that he left the dock area at approximately 6:30 or 7:00 p.m. TR 153-156, 159; RX-4, RX-5, RX-3.

Claimant testified that he chose a clinic near his home from a list of possible drug testing sites offered and arrived at the clinic at approximately 8:00 p.m after showering at home. Claimant stated that he did complete and sign an occupational injury report at the clinic where he was tested. He added that he included "Tylenol, two pills" in the "Drug, Alcohol Testing Release" in the space requesting medications taken. Claimant testified that when they asked what kind of Tylenol he had taken, he answered that he did not know, but his wife had the prescription with her and she showed it to the attendant. The attendant then wrote Tylenol w/cod. 30 mg. Claimant testified that this was the first time he realized that the pills were more than ordinary Tylenol. TR 156-160; RX-2.

Claimant testified that the doctor at the clinic examined him and took x-rays that showed he had no broken bones. He stated that when he told the doctor that his pain was worsening, the doctor instructed him to return the next day to the industrial section of the clinic. Claimant testified that the doctor also took a urine sample and prescribed medication for pain which he obtained at a pharmacy in the clinic. He stated that after receiving the medication he was asked to sign a "paper." Claimant

testified that he was not asked what medication he had taken within the last thirty days before signing the paper as he was before he saw the doctor. TR 160, 161.

Claimant testified that he returned to the industrial clinic the next day, Saturday, and the doctor gave him another prescription and instructed him to return on Monday. He stated that he was feeling worse on Monday and the doctor prescribed physical therapy. Claimant testified that after two-and-a-half weeks of physical therapy his condition had not improved and he saw an orthopedic surgeon, Dr. Howard Finkel who did an MRI. Based on the MRI, Dr. Finkel recommended surgery which the company approved after getting a second opinion from Dr. Pennington. Claimant stated that he was not capable of doing the things he was instructed to by Dr. Pennington who then began to shake and push him to try to have him do as instructed. Claimant added that after the examination Dr. Pennington told him that he did need surgery. He stated that he wanted to avoid surgery and asked for another opinion wherein he was told by his insurance agent that he would have to pay for that himself. Claimant testified that because his condition was worsening, he agreed to the surgery. TR 161-165.

Claimant testified that a day or two later he received the results of his drug test. He stated that he was surprised that the drug test came back positive. Claimant testified that he spoke with the union and they suggested that he file a grievance. He stated that he spoke to Don Huey who asked him if he did drugs. He answered that he did not and explained that he had taken Tylenol and had told the individual at the clinic that he had. Claimant testified that he then went to the clinic and inquired as to why they did not include the information stating what medication he had taken that day on the drug screen form. They explained that such information is not included in the instructions to the lab and the lab sends the results directly to the Maritime Association. Claimant stated that he was not told that he was eligible for retesting. TR 165-167.

Claimant testified that he worked June 26, 1997, the day before the accident, for company number 8 on job 24. He stated that at the conclusion of the workday he returned home with back and shoulder pain and his wife gave him "white pills" for the pain. Claimant testified that on June 24, 1997 he worked two jobs totaling fourteen hours, including rigging and driving, and left at 1:30 a.m. June 25, 1997. He stated that his back, shoulder, and head were "sore." Claimant testified that he had a previous shoulder injury, a rotator cuff tear, which occurred in 1993 or 1994 and required surgery. Claimant testified that his wife gave him pills for pain that morning when he arrived home. He stated that he assumed the medication was "regular" Tylenol. Claimant testified that he realized that the medication was not "regular" Tylenol when he went to the clinic after his June 27, 1997 accident and his wife produced the prescription. He stated that, when he inquired, his wife informed him that it was the same medication she had given him previously that week. Claimant testified that in addition to the pills he took on June 27th which he included on the form, he had also taken a total of five other pills which his wife gave him which he assumed were Tylenol. TR 168-172, 181, 197, 198; RX-22.

Claimant testified that since the results of his drug test, Respondent has neither authorized medical care for him, nor paid compensation. He stated that his personal medical insurance has paid some of the medical bills and the West Gulf Maritime Association has paid for others. Claimant

stated that his back surgery on November 5, 1997 was paid for by the Maritime Association. He added that he has had physical therapy since his surgery and it has helped. TR 173, 174.

Claimant testified that he returned to work as a driver on May 4, 1998 for one day. He stated that he completed the day, but returned to his treating physician the following day and was taken off work. He stated that he next attempted to return to work as a driver on June 29, 1998. Claimant testified that he also attempted to work as a flagman, but could not stand in the same spot for extended periods because he was in pain and there was no opportunity to rest. He stated that he has been able to continue working as a driver, but has to leave early because the older trucks do not have springs and that causes discomfort. Claimant testified that although he is trying to work as much as possible and has never quit before the end of a driving day, he sometimes must miss a day following a workday because of pain. He added that he has attempted to work in the hatches but could not go up and down the ladders. Claimant testified that he could not do jobs he did prior to his injury such as working in the hold, securing with or without tools, rigging, or acting as a hook man because of his back pain. He stated that his wages for July 1998 was the maximum he could earn in a thirty day period with the work available to him. TR 174-180.

Claimant testified that during the union grievance investigation the union contacted a toxicologist who spoke with Mrs. Rodriguez. He stated that he did not believe that he told the grievance committee that he had a prescription which he was taking for Vicodin dated February 16, 1994 from Dr. Craig Couch. Claimant explained that he was not aware that he was taking prescription medicine when he took the pills given to him by his wife. Claimant stated that he did not remember if a doctor for the West Gulf Maritime Association stated that he did not take Vicodin based on his drug test results. He stated that he had seen the drug test results which showed positive for opiates, codeine and morphine. TR 198-202.

Claimant testified that he requested to tape record an examination by Dr. Jack Pennington because his English is not very good and there was no one to accompany him. He stated that Dr. Pennington told him that the taping was unnecessary as he puts his findings in writing. Claimant told Dr. Pennington that he, the patient, would not see the writing and because he did not understand well he wanted to record the visit. Claimant testified that Dr. Pennington refused to examine him if recorded and he left without the examination. He stated that he never recorded his visits with Dr. Howard Finkel. TR 202, 203.

Claimant testified that he met with someone at West Gulf Maritime Association at their office. He stated that he was alone and did not bring any prescription bottles with him. TR 203, 204.

Don T. Huey

Don Huey testified by deposition on August 19, 1998 that Claimant underwent a drug test on March 12, 1997 at the request of West Gulf Maritime Association (WGMA) as part of a physical examination given to certified personnel every two years. Mr. Huey added that Claimant is a certified truck driver who members of WGMA hire through ILA Local 24. He stated that another drug test administered to Claimant on September 26, 1996 was also part of a physical examination. Mr. Huey

testified that on April 14, 1994 Claimant was given a physical exam which also included a drug test. CX-23 pp. 5, 6.

Mr. Huey testified that Ceres Gulf is a member of WGMA and through contractual agreement WGMA administers the truck driver certification. He stated that the safety department of WGMA provides services for the stevedoring companies in the Port of Houston such as on-the-job surveys, informing them of federal regulations, training, and advising of changes in legislation relevant to OSHA and marine terminals and longshore. Mr. Huey testified that WGMA adiministers the contract with ILA including payroll and contract disputes. He stated that if Claimant had a dispute with any of the stevedoring companies in the West Gulf at the Port of Houston, WGMA would be the agent to investigate the disputes and take action necessary on behalf of Ceres. CX-23 pp. 7-9.

Mr. Huey testified that ILA Local 24 is notified of the date on which a member is slated to receive the standard bi-annual Department of Transportation (DOT) physical including a urine drug screen. He stated that WGMA designated Premier Analytical Laboratories to perform all drug screens which are standard under DOT guidelines. Mr. Huey testified that the chain of custody of the sample goes from the doctor's office by courier to the lab where the testing is done. Mr Huey added that Claimant's sample was under seal during the chain of custody. He stated that Claimant's drug screen of March 12, 1997 was negative for all ten drugs tested. Mr. Huey testified that results of examinations and drug screens are maintained in separate files for each driver. He added that a drug screen may be required when WGMA does a random "drug sweep" of everyone working at a location, as the result of an accident, or for workers under a three year reinstatement grace period after being caught on drugs. CX-23 pp. 9-16, 56-58.

Mr. Huey testified that all those involved in on the job accidents must submit to a drug screen within six hours. He stated that the worker is sent to his choice of acceptable facilities where some treatment may also be administered. Mr. Huey testified that the testing and treating clinic then files a report with WGMA. CX-23 pp. 17-20.

Mr. Huey testified that if a member suspects that a longshoreman is under the influence of some type of medication, they can notify WGMA and WGMA will go to the work site and discuss it with the longshoreman and the superintendent and ILA and make an informed decision as to whether or not to send him for a drug screen. He stated that during the decisionmaking process, the individuals involved observe the worker's behavior and his responses to questions, and look for telltale physical signs of drug influences. Mr. Huey testified that if it is decided that the worker should be drug screened then a form is completed and the worker is sent for the test. He stated that there is no limit to how frequently a longshoreman can be requested to submit to a drug test on suspicion that he is under the influence. CX-23 pp. 23-26.

Mr. Huey testified that drug screens done in relation to driver certification are kept in one file and another file would contain any positive result of drug screens taken for any other reason. He stated that negative results are kept for a certain time but are not filed according to individual. Mr. Huey testified that, other than the drug screen related to his workplace accident, Claimant had no record of positive drug screens. He stated that the July 1, 1997 report on Claimant's accident related

drug screen stated that Claimant was positive for opiates, codeine and morphine. Mr. Huey testified that there was no follow-up testing on Mr. Rodriguez. He stated that when Claimant tested positive, WGMA contacted the president of Local 24 and asked that he bring Claimant in with his prescriptions and, if he had not been prescribed what he tested positive for, he would be put off work for sixty days. Mr. Huey testified that a meeting was held on Claimant's case with himself, Claimant, the local head of WGMA, and possibly Hal Draper of the local in attendance. CX-23 pp. 29-35.

Mr. Huey testified that at the meeting Claimant stated that he was hurt on the job and took his wife's medication for pain to keep working. Mr. Huey stated that he told Claimant that he could not take a controlled substance unless it was prescribed for him. Mr. Huey testified that Claimant had the right to request a retest which was included in information sent to him, but did not. He testified that Claimant was not put off work immediately because he was injured and not working. Mr. Huey stated that when Claimant was released to return to work a year later, his sixty days off began. CX-23 pp. 37-39, 52, 53.

Mr. Huey testified that a grievance proceeding was called relative to Claimant. He stated that in a grievance hearing management of the member companies, labor relations personnel, the local, and the individual discuss the situation and decide how to proceed based on the facts. Mr. Huey testified that Jerry Kneisler of Stevedore Services of America; Paul Estachy of Southern Stevedoring Association; Raymond and Harold Cleland of the union; Jim Morrison, vice president of labor relations with WGMA, John Tollefsen, stevedore superintendent of Ceres Terminals, Inc., Dr. Ernie Lykissa, toxicologist from Drug Labs of Texas, and Claimant were present at Claimant's hearing.[4] CX-23 pp. 39-41.

Mr. Huey testified that although Claimant was suspended for sixty days based on the results of his drug screen, the suspension had not been executed and to his knowledge no informal agreement was made. He stated that, although the contract between WGMA and the ILA mandates drug testing when an on the job accident occurs, the stevedore superintendent has the discretion to choose not to order drug testing. Mr. Huey stated that management personnel could initiate an investigation if they suspected that an ILA member was under the influence of drugs or alcohol. He added that if a longshoreman tested positive for a prescription medication and then submitted the prescription written in their name, no action would be taken, but if the medication was not prescribed and fit into one of ten stated categories, he would be suspended for sixty-days. CX-23 pp. 42-51.

Mr. Huey testified that the initial drug screen letter from Dr. Rodriguez of Industrial Clinic did not state that Claimant had taken prescription medication prior to his drug test. He stated that a document dated June 26, 1997 completed by Dr. Gonzalez does include a statement that Claimant informed the clinic that he had taken Tylenol with codeine. Mr. Huey testified that he did not know why Claimant's drug file did not include that he had taken Tylenol with codeine prior to his drug screen. CX-23 pp. 60-62.

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[4]Drug Labs of Texas was formerly known as Premier Analytical Laboratories. CX-23 p.41.

Medical Evidence

Howard Z. Finkel, M. D.

Dr. Howard Finkel, an orthopedic surgeon, testified by deposition that he first treated Claimant on July 21, 1997 for an injury sustained in June 1997 when he slipped and fell twisting his low back. Dr. Finkel stated that Claimant told him that he first went to an emergency medical clinic where x-rays were taken of his back and medication prescribed. He added that Claimant stated that he was treated with multiple medications and physical therapy. CX-2 pp. 6-8.

Dr. Finkel testified that when he first saw Claimant, he was complaining of pain in his left low back, radiating into his left leg with numbness and tingling over the left side of the leg. He added that Claimant was having pronounced pain at night with difficulty sleeping and ambulated with the assistance of a cane due to weakness in his leg. Dr. Finkel stated that on physical exam Claimant's range of motion in his back was very limited and he had difficulty with attempts to bend forward or laterally or straighten. He added that Claimant's test for nerve pain was very positive on the left side manifesting nerve compression. Dr. Finkel testified that Claimant also exhibited weakness in the left leg, pain in the low back to pressure, and pain over the buttock area. He stated that Claimant's symptomatology was consistent with nerve root pressure resulting from a herniated or ruptured disk in the low back. Dr. Finkel testified that he prescribed steroids and pain medication and counseled that he should remain off work and return in a week. He stated that he usually begins with the most conservative treatment and, if there is no response, progresses to more aggressive treatment. CX-2 pp. 8-10.

Dr. Finkel testified that Claimant returned in five days with increased pain. He stated that on physical exam his findings were similar to the first visit, but Claiamant presented with decreased strength and increased pain upon straight leg raising on the left. Dr. Finkel testified that he ordered an MRI in August 1997 which revealed an extremely large herniated disk at the left 4-5 level. A piece or fragment which appeared to have broken off and migrated into the spinal canal was exerting pressure on the nerve root. He stated that based on these findings and a continuing exacerbation of Claimant's pain, he suggested surgical excision of the disk. Dr. Finkel testified that most disks are 5,6,or 8 millimeters and a very large one is 15 millimeters. He added that Claimant's disk was 20 millimeters. Dr. Finkel testified that he previously treated Claimant for a prior back injury in 1990 when an MRI showed a small bulging at the same level. A subsequent myelogram and CT scan in 1992 showed nothing. Dr. Finkel stated that with knowledge of Claimant's history of prior back problems, he believed Claimant's herniated disk and necessary surgery were related to his injury and accident of June 27, 1997. He stated that a twisting injury or a direct trauma are the two types of accidents that lead to disk herniation. CX-2 pp. 10-15.

Dr. Finkel testified that although Claimant was experiencing exacerbation of his symptoms with atrophy of his leg and abdominal muscles due to deconditioning from lack of exercise, he was having difficulty scheduling the surgery as he was notified that worker's compensation would no longer provide medical care and treatment. He stated that eventually the surgery was approved by Claimant's personal insurance and was performed on November 5, 1997. Dr. Finkel testified that he

performed a lumbar laminectomy, diskectomy, and foraminotomy. He stated that Claimant tolerated the surgery well and left the hospital in three days. CX-2 pp.16-19.

Dr. Finkel testified that Claimant was on no duty subsequent to his initial visit and remained off duty through the surgery. He stated that post-surgery Claimant was followed closely. Dr. Finkel testified that Claimant had an immediate reduction in leg and back pain, but had residual pain and weakness in both areas. He stated that Claimant underwent an extensive physical therapy and work hardening program and was prescribed pain medications, muscle relaxants, and anti-inflammatory drugs. Dr. Finkel testified that Claimant participated well and was motivated to rehabilitate his back. He stated that after the work hardening program Claimant was still experiencing soreness in his back with residual symptoms on his left side. Dr. Finkel testified that Claimant attempted to return to work on approximately May 4, 1998. CX-2 pp.19-22.

Dr. Finkel testified that Claimant returned to him after only three days of work with increased pain due to jarring while driving the trucks. He stated that he took Claimant off work after physical exam showed decreased mobility and back spasms. Dr. Finkel testified that he next saw Claimant on June 8, 1998. He stated that Claimant appeared much improved. Dr. Finkle testified that he was concerned about the type of vehicle that Claimant drove and he ordered a special seat which he believed would have some shock absorbing effect. On June 23, 1998 Claimant returned to Dr. Finkle further improved and Dr. Finkle gave him a light work order. Dr. Finkle testified that he considered Claimant's light duty to consist of only driving the truck. He stated that he did not want Claimant to bend or twist or attempt to assume unusual positions which would stress his back. Dr. Finkle testified that when he next saw Claimant on July 16, 1998 driving was not problematic unless he was driving an older truck, but his attempts to perform other jobs he had performed prior to his surgery caused problems. Claimant next saw Dr. Finkle on August 20, 1998 with increased soreness and spasm due to his attempts to perform his former jobs and the theft of his special seat. However, Dr. Finkle believed that he was progressing satisfactorily. Dr. Finkle testified that he last saw Claimant on September 24, 1998 and found his condition about the same as the last visit and doing his regular work as a truck driver. He added that Claimant was not able to get a new supportive seat. CX-2 pp. 22-28.

Dr. Finkle testified that assuming Claimant was to continue working as a longshoreman, he would recommend that Claimant be limited to activities that do not involve heavy lifting (not to exceed 20 to 25 pounds and not repetitively), repetitive bending, bending for long periods, or assuming unusual positions. Dr. Finkle stated that although Claimant has shown some improvement, once a disk is removed the back is not as strong. He estimated that Claimant's has a 15%-23% impairment and reached MMI as of his last visit on September 24, 1998. CX-2 pp. 28-30.

Dr. Finkle testified that Claimant would likely not be able to work as a flagman because he could not do the repetitive bending and rising. He stated that he could lift twenty pounds, but because the job entailed lifting up to 120 pounds he could not perform the job. Dr. Finkle testified that Claimant could not work as a rigger lifting rods weighing from forty-five to ninety pounds. He stated that Claimant could possibly do securing work, but it would be best to avoid it. Dr. Finkle

testified that Claimant could operate a forklift itself, but could not handle the fifty-five gallon drums which are moved as part of the position. CX-2 pp.31-35.

Dr. Finkle testified that he has never suspected Claimant of abusing prescription medications. He stated that Claimant had a positive, constructive attitude and desired to return to work. CX-2 pp. 35, 36.

Dr. Finkle testified that he considered his treatment, the physical therapy, the hospital treatment and anesthesiology given to Claimant to be reasonable and necessary medical treatment for Claimant's June 27, 1998 injury. He stated that the charges for the aforementioned treatment were customary and reasonable for the community. CX-2 pp.37-39.

Dr. Finkle testified that he recommended a visit subsequent to Claimant's last visit on February 14, 1994, but there is no record of his return. He stated that notes of the February 1994 visit included that Claimant was experiencing some soreness in his right side and intermittent days with pain and tingling in his left leg and could be doing light duty except for pain due to a shoulder injury. Dr. Finkle testified that by light duty he meant primarily driving with no heavy lifting. Dr. Finkle testified that Claimant's medical condition related to the 1990 injury was much less severe than the 1997 injury. He stated that Claimant did not need surgery for that injury and the latest tests showed that he did not have a herniated disk. CX-2 p. 42, 46, 48, 49.

Dr. Finkle that from his experience in treating patients with back problems he has formulated opinions about how much lifting, bending, twisting, or climbing can be tolerated in relation to Claimant's type of injury and procedure. Dr. Finkle testified that he was not an expert on drugs, but he opined that Vicodin, a hydrocone, and Tylenol 3 with codeine were similar chemically. CX-2 pp. 44-46.

Gerald R. Litel, M.D.

Neurologic surgeon, Dr. Gerald Litel, in his1993 report relative to Claimant's 1990 injury noted that Claimant had sustained two serious low back injuries prior to his 1990 injury. He opined that Claimant sustained only a low back sprain and contusion in his 1990 accident. Dr. Litel stated that MRIs in both 1987 and 1990 revealed a bulging disc at the L4-5 level. He added, however, that the CT and lumbar myelogram performed on March 15, 1992 were normal. RX-8 pp. 14, 15.

Ernest D. Lykissa, Ph.D.

Dr. Ernest Lykissa, Associate Professor of Toxicology with Baylor College of Medicine, testified by deposition that the release form for the purposes of performing a drug test on a urine specimen indicated that Claimant ingested two Tylenol with codeine at 8:00 p.m. on June 26, 1997. He stated that Drug Labs of Texas requisition and chain of custody form for Claimant's urine drug screen indicates that Claimant was not taking any medication. Dr. Lykissa testified that there is nothing in the chain of custody document to indicate that the chain was broken or severed or that the specimen was tampered with. He stated that Vicodin is not consistent with the reference to Tylenol,

two pills with codeine because Vicodin and Tylenol are "two different things." Dr. Lykissa testified that if Claimant had ingested Vicodin, which contains hydrocone, he would have presented with hydrocodone in his urine sample. He stated that because Claimant's metabolic breakdown showed more morphine than codeine, Claimant could possibly have taken codeine for as long as two weeks prior to the drug screen. Dr. Lykissa testified that there is no question in his mind that Claimant's work performance was adversely affected by the drugs which are reflected on the positive drug test. He stated that Claimant is fortunate he was not stopped by the Houston Police Department and given a Houston Police drug test as he could have been accused of using a controlled substance and could have served a jail sentence. Dr. Lykissa testified that to exhibit the morphine/codeine levels presented by Claimant in his specimen at 8:00 p.m. on June 27, 1997 he would have had to ingest one and one -half pills of morphine and half a pill of codeine. He stated that he would expect an individual showing the codeine/morphine levels that Claimant showed at 8:00 p.m. to have impaired hand-to-eye-to-foot coordination and his mind would be asleep. Dr. Lykissa testified that it would take a trained observer such as one trained to perform a field sobriety test to determine if Claimant was intoxicated. RX-32 pp. 4, 5, 7-9.

Dr. Lykissa testified that the fact that Claimant was injured at 10:30 a.m. on June 27, 1997 and took the medication between 12:00 noon and 1:00 p.m. did not alter his opinion of Claimant's impairment. He stated that Claimant's testimony that he took the medication at noon is not supported by the results of the drug screen. Dr. Lykissa testified that the results would support an ingestion of morphine two and one-half times that of codeine, but not the stated ingestion of two Tylenol with codeine. He stated that in drug diuresis the time of ingestion is critical and it would take at least forty-eight hours for the morphine/codeine levels to be equal. Dr. Lykissa testified that the assayed sample indicated that the only medication he could have taken at noon is an oral dose of morphine with some codeine because there is no other way for methylae morphine to be introduced into the body. He stated that if Claimant had ingested five Tylenols with codeine between Wednesday, June 25, 1997 morning at 1:00 a.m. when he returned from work and Friday, June 27, 1997 at 8:00 p.m. the results of his drug screen would be plausible as his liver would have had a chance to habituate and demethylate the codeine into morphine. Dr. Lykissa testified that the impairments such as drowsiness, slowness of functioning, and anesthesia from the amount of Tylenol with codeine ingested over three days would not be as great because the individual would have become somewhat habituated to the effects. RX-32 pp. 12-15.

Dr. Lykissa testified that the chain of custody form utilized at Premier Drug Labs is to ensure that a sample that has been collected is not tainted or switched. CX-32 p.18.

Dr. Lykissa testified that he stated in the Spot Grievance Committee hearing that Claimant did not take any Vicodin based on the chemical signature in his specimen. He stated that because there was nohydrocone present in his urine he could not have ingested Vicodin. [5] Dr. Lykissa testified that foods or nutritional supplements taken with medication can either slow down or speed up the excretion of the medication. Dr. Lykissa opined that based on the drug screen report that the

[5]Dr. Lykissa explained that Vicodin is a brand name of hydrocone. CX-32 p. 23.

codeine that Claimant had taken was not excessive, probably one or two codeine pills at a time. He stated that if Claimant could perform the functions testified to by his co-workers with the stated level of proficiency his impairment was not great. CX-32 pp. 23- 25, 27, 28.

Dr. Lykissa testified that the half-life of codeine had nothing to do with the presence of morphine in the blood. He stated that it is the ratio of codeine or norcodein and morphine in the system that demonstrated what an individual ingested and when they ingested it. Cx-32 p. 29.

Edward G. Ezrailson, Ph.D.

Dr. Edward Ezrailson, a biochemist, testified by deposition that he reviewed a medical report and opinion by Dr. Lykissa and drug test results from Premier Analytical Laboratories. He stated that a chain of custody is important in drug testing to establish that the results that are obtained from the specimen are matched with the donor and to protect against contamination, tampering, or something malicious. Dr. Ezrailson testified that it appeared that what looked like a "Y" on Claimant's chain of custody document had been altered from some other symbol. He stated that in two instances the condition of the seal on Claimant's specimen is questionable. Dr. Ezrailson testified that according to DOT drug collecting procedures, the integrity of the seal on a specimen must be maintained. He added that if there were a question as to the condition of a seal, as in the instant case, he would void the result sheet and get a second specimen. CX-24 pp. 5-11.

Dr. Ezrailson testified that he agreed with the results of the test showing positive for codeine/morphine. Dr. Ezrailson stated that he did not agree with Dr. Lykissa's report that Claimant's morphine level was such that he was a chronic user and that his blood levels were sufficient to "land him in jail." He added that he did not agree with Dr. Lykissa's final report regarding the results as such testing is used to detect drugs, not to determine whether an individual is a chronic user. Dr. Ezrailson testified that Dr. Lykissa's findings were based on the level of morphine alone whereas scientific research demonstrated that all of the metabolites of codeine must be measured to determine if results exhibit chronic use. He stated that drugs other than codeine, including over the counter medications, are oxidatively dealkalated and therefore would induce enzymatic production resulting in a morphine peak as high as exhibited in Claimant's case. Dr. Ezrailson testified that the enzyme can be induced by "a whole host of other drugs and prior use of prescription codeine." He stated that Claimant's ingestion of three Tylenol's with codeine prior to his accident and two pills at lunch subsequent to his accident would result in the high degree of morphine at the time of his drug testing at 8 p.m. on Friday. CX-24 pp. 12-14, 20, 31.

Dr. Ezrailson testified that the Tylenol with codeine taken by Claimant on Wednesday at 1 a.m. and Thursday at 10 p.m. would have no effect on his physical abilities at 10:30 a.m. Friday because, based on a half-life of four hours, the thirteen hour delay would allow for only seven percent of the original dose still present in Claimant's body. He stated that the testimony of co-workers present on the job site on Friday morning and afternoon stating that they noticed no difficulty in Claimant's ability to perform confirmed his belief that Claimant would not be impaired. Dr. Ezrailson testified that the main effect of codeine is mental clouding resulting in errors in job performance and less responsivity to his environment. He stated that upon review of testimony of his co-worker's,

Claimant exhibited no such impairment. Dr. Ezrailson testified that having seven percent of the original dose of Tylenol with codeine in his system would have no effect on his ability to dismount from his truck. CX-24 pp. 17-24.

Dr. Ezrailson testified that Claimant's drug test results are consistent with his taking a medication containing codeine. He added that Vicodin is such a compound. Dr. Ezrailson stated that he did not agree with Dr. Lykissa's statement that Claimant did not take Vicodin based on the chemical signature of Claimant's urine. He stated that such an assertion has no scientific basis in fact because the screen assayed for codeine and its metabolite morphine only and did not include testing for other metabolites that would identify the compound specifically as Vicodin. Dr. Ezrailson testified that codeine has a specific chemical structure and there if no difference between codeine in Vicodin or in other preparations. He stated that Dr. Lykissa's report is not supported by scientific evidence whereas his report his supported by studies from medical and scientific literature back to 1966. CX-24 pp. 34-37.

Jack W. Pennington, M.D.

Dr. Pennington, an orthopedic surgeon, noted in his letter of August 20, 1997 that surgery would be indicated if there Claimant had continuing radicular type symptoms. He stated that the surgery would be secondary to Claimant's accident of June 27, 1997, particularly if a free extruded disc fragment were found. RX-14 p. 1.

In a letter to Schaffer Insurance Adjusters, dated July 27, 1998, Dr. Pennington stated that it appears that Mr. Rodriguez has had a successful result with surgery and should be able to return to his job. He added that "there is obviously a lot of subjective data and a lot of reasons for secondary gain and psychosocial issues to be at work in this particular case." He opined that, if there is real concern about persistent symptoms and inability to work, an MRI with contrast should be performed. RX-31 p. 5.

Other evidence

Lorie McQuade-Johnson

Lorie McQuade Johnson, a certified vocational rehabilitation specialist, testified that she did a labor market survey and vocational opinion based on information provided regarding Claimant. Ms. McQuade-Johnson stated she was first contacted to do the survey in July of 1998. She stated that her projections were based on approximately one month of employment records received from West Gulf Maritime Association. Ms. Johnson stated that based on Claimant's age, education, training, experience there were both employment as a longshoreman in the Port of Houston and suitable alternative employment in the Houston labor marked for hit. She stated that wages for the alternative employment ranged from $5.50 per hour to close to $15.00 per hour with the more probable employment being at $10.00 per hour. Ms. Johnson testified that some of the positions included overtime at time and a half or double time. She stated that she projected Claimant's earning

capacity in the alternative employment to be $400.00 per week. RX-33 pp. 7, 8, 11-14, RX-26; RX-30.

Ms. McQuade-Johnson testified that from the work records she reviewed she could not discern whether the stated employment was as a truck driver or for other positions. She stated that she was not able to speak to Dr. Finkle concerning Claimant's condition, nor did she speak to anyone from Respondent's office to discuss Claimant or his work opportunities or experiences there. Ms. McQuade-Johnson testified that she was not aware that within the 52 weeks prior to claimant's injury and accident he performed multiple jobs on the waterfront in addition to truck driving. However, in reviewing Claimant's work records, she affirmed that Claimant had performed twenty-one different jobs during the fifty-two weeks prior to his injury and that of 2449 hours worked, 1153.5 were for truck driving. RX-33 pp. 15-21, 23; RX-30.

Ms. McQuade-Johnson testified that Dr. Finkel's records stated that Claimant was released after surgery to return to work on May 1, 1998 and was removed from work on May 7, 1998 when Claimant reported back pain immediately upon returning to work. She stated that Claimant then returned to work in June with restriction to light duty, although light duty was not specifically defined by Dr. Finkle, however he did include that Claimant could return to driving with, if needed, a back support for his seat. RX-33 pp. 23-25.

Ms. McQuade-Johnson testified that she was not aware of any Department of Labor or AMA guidelines that prohibit a patient from recording what transpires during a doctor's examination. RX-33 pp. 27.

Ms. McQuade-Johnson testified that she concluded that Claimant could work on a full-time basis because there was no medical documentation provided that indicated he could not do so. She added that Claimant worked nine days in July and there is nothing to suggest that he didn't choose not to work more than he did. Ms. McQuade-Johnson testified that it would be "very, very helpful" to have a statement from Dr. Finkel defining specifically Claimant's physical limitations. She stated that pain can be a limiting factor in an individual's ability to work and an individual may be able to perform a job on one day, but not be able to return the next without significant problems because of an exacerbation in his pain or discomfort. RX-33 pp. 28, 31, 32.

Ms. McQuade-Johnson testified that among the jobs performed by Claimant prior to his injury accident he would not be able to charge or discharge cargo, act as a hook man, secure, She stated that Claimant could act as a gang foreman; automobile, lift truck, winch, or truck/tractor driver, or crane operator. Ms. McQuade-Johnson testified that it appeared that Claimant was heeding his doctor's advise and driving only. RX-33 pp. 33-38, 41.

Ms. McQuade-Johnson opined that there are other jobs on the dock that are less physical than truck driving that Claimant could be performing. She stated that she is not aware of any reason why such positions would not be available to Claimant. RX-33 pp. 42.

Post-trial Motions

This Court herein grants Respondent's motion to supplement the record for good cause shown. Thus, Claimant's wage records through December 28, 1998 will included in the record as RX-39. This Court believes that the inclusion of said records portrays a more accurate and complete evaluation of Claimant's true post-injury wages.

Additionally, in the interest of fairness and justice and because this Court has allowed Respondent to supplement the record, Claimant's proffer of Claimant's affidavit and the individual gang sheets will also be accepted into the record.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon the Court's observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, the Court has been guided by the principles enunciated in Director, OWCP v. Maher Terminals, Inc., 114 S. Ct. 2251 (1994) that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, the Court may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on its own judgment to resolve factual disputes or conflicts in the evidence. Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates § 556(d) of the Administrative Procedures Act. Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251, 28 BRBS 43 (1994).

I. Fact of Injury

To establish a prima facie claim for compensation, a claimant need not affirmatively establish a connection between the work and harm. Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his injury was causally related to his employment if he establishes that he suffered a physical injury or harm and that working conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. See Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989). An accidental injury occurs if something unexpectedly goes wrong within the human frame. An injury need not involve an unusual strain or stress; it makes no difference that the injury might have occurred wherever the employee might have been. See Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968); Glens Falls Indemnity Co. v. Henderson, 212 F.2d 617 (5th Cir. 1954). The claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. Hampton v. Bethlehem Steel Corp., 24 BRBS 141 (1990); Golden v. Eller & Co., 8 BRBS 846 (1978), aff'd, 620 F.2d 71 (5th Cir. 1980). However, the claimant must show the existence of working conditions which could have conceivably caused the harm alleged. See Champion v. S&M Traylor Bros., 690 F.2d 285, 295 (D.C. Cir. 1982).

Once Claimant has invoked the presumption, the burden shifts to employer to rebut the presumption with substantial countervailing evidence. See James v. Pate Stevedoring Co., 22 BRBS 271 (1989). The employer must present specific and comprehensive medical evidence proving the

absence of or severing the connection between such harm and employment or working conditions. Ranks v. Bath Iron Works Corp., 22 BRBS 301, 305 (1989); James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. Volpe v. Northeast Marine Terminals, 671 F.2d 697 (2d Cir. 1982); Del Vecchio v. Bowers, 296 U.S. 280 (1935).

Section 3(c) of the LHWCA provides:

> No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure himself or another.

33 U.S.C. § 903(c).

Even if a claimant is injured in the course of employment, Section 3(c) bars compensation if the injury was occasioned solely by the intoxication of the emloyee. Oliver v. Murry's Steaks, 17 BRBS 105 (1985). Section 20(c) provides a presumption that the claimant's injury was not occasioned solely by his intoxication. 33 U.S.C. § 920(c). The Section 20(c) presumption must be rebutted with substantial evidence before Section 3(c) will bar benefits to the employee.

The Board has held that the Section 20(c) presumption can be overcome only by substantial evidence that the claimant was intoxicated and that the injury was caused solely by the intoxication. Walker v. Universal Terminal & Stevedoring Corp., 7 BRBS 1019 (1978); Shelton v. Pacific Architects & Eng'rs, 1 BRBS 306 (1975).

In Sheridon v. Petro-Drive, Inc., 18 BRBS 57 (1986), the Board reversed the denial of benefits, pursuant to Section 3(c), holding, "in light of the express statutory requirement that the injury must be 'solely' due to intoxication and the presumption against such (in Section 20(c)), it is clear that employer has the heavy burden of virtually ruling out all other possible caused of injury before the intoxication defense is proven. As stated in reference to the similar intoxication defense statute in the New York Workers' Compensation Act, intoxication will defeat a claim only when all the evidence and reasonable inferences flowing therefrom allow no other rational conclusion that the intoxication was the sole cause." The employer must also show the injury was due to intoxication and, although every hypothetical cause need not be negated, it must present evidence that permits no other rational conclusion but that intoxication was the sole cause. Id. at 60. The Board thus vacated the judge's decision and remanded for proper application of Section 20(c). According to the Board, "the contours of this burden have been outlined by the New York Court of Appeals as follows: If the employer seeks to establish that intoxication was the sole cause of the accident, the burden is upon him to offer substantial evidence from which reasonable persons would reasonably draw the inference (a) that the employee was drunk at the time of the accident; (b) that he fell owing to his drunkenness asnd was injured.

In the instant case, Claimant has established a prima facie claim for compensation. Claimant has established that his injury was causally related to his employment because he has established that

he suffered a physical injury and conditions existed in the workplace which could have caused the accident. The credible testimony of Claimant and his co-worker who witnessed the accident, Robert Harrison, established that the accident and injury occurred in the workplace. Additionally, testimony established that a driver slipping on the step used to exit the truck was not an unusual occurrence. Thus, this Court finds that Claimant has established a prima facie claim for compensation under the Act.

Respondent argues that Claimant's injury was caused solely by the Claimant's intoxication and, resultingly, the injury is not compensable. However, this Court finds that Respondent has failed to meet his burden of proving by substantial evidence that intoxication was the sole cause of Claimant's accident. Respondent's expert, Dr. Lykissa, argues that the level of codeine in Claimant's blood taken for the drug screen was adequate to indicate impairment in hand-to-eye-to-foot coordination. However, Claimant's expert, Dr. Ezrailson, refutes this argument testifying that Claimant would not have been impaired at 10:30 a.m. Friday, June 27, 1998 the time of the accident, by medication taken the previous Wednesday, June 25 at 1:00 a.m. and Thursday, June 26 at 10:00 p.m. (pre-accident ingestion testified to by Claimant) based on the half-life of codeine. Claimant's blood level evidenced in the drug screen was based on a codeine level effectuated by the ingestion of two Tylenol with codeine taken post Claimant's accident at approximately noon on June 27, 1998. Additionally, the testimony of Claimant's co-workers at the time of the accident who unanimously testified that Claimant performed the most difficult maneuvers with alacrity, without observable impairment, and without complaints refute a finding of impairment. This Court finds that the performance testified to would be infeasible if Claimant suffered from the impairments incurred by the systemic effects of codeine proffered by either Dr. Lykissa or Dr. Ezrailson who testified that codeine impairment is evidenced by mental clouding inducing errors in job performance.

In addition, the testimony offered by Robert Harrison, a member of the truck driving board and certified truck driver since 1991, supports Claimant's assertion that he slipped on the step used to exit the truck. Mr. Harrison's testimony established that slipping on the small step located on the fuel tank was not an unusual occurrence. Claimant's credible testimony, supported by Mr. Harrison's testimony, established that Claimant's accident was caused by his slipping on the step and, thereby, establishes that rationally intoxication was not the primary factor in Claimant's accident.

Thus, this Court finds that Claimant has established a prima facie claim for compensation and Respondent has failed to meet his burden of rebutting the presumption by substantial countervailing evidence and, therefore, Claimant's claim is compensable.

II. Maximum Medical Improvement

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. Louisiana Insurance Guaranty Assoc. v. Abbott, 40 F.3d 122, 29 BRBS

22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamic Corp., 10 BRBS 915 (1979). However, if the medical evidence indicates that the treating physician anticipates further improvement, unless the improvement is remote or hypothetical, it is not reasonable for a judge to find that maximum medical improvement has been reached. Dixon v. John J. McMullen & Assoc., 19 BRBS 243, 245 (1986); See Mills v. Marine Repair Serv., 21 BRBS 115, 117 (1988). The mere possibility of surgery does not preclude a finding that a condition is permanent, especially when the employee's recovery or ability is unknown. Worthington v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 200, 202 (1986); White v. Exxon Co., 9 BRBS 138, 142 (1978), aff'd mem., 617 F.2d 292 (5th Cir. 1980).

A judge must make a specific factual finding regarding maximum medical improvement, and cannot merely use the date when temporary total disability is cut off by statute. Thompson v. Quinton Eng'rs, 14 BRBS 395, 401(1981). If a physician does not specify the date of maximum medical improvement, however, a judge may use the date the physician rated the extent of the injured worker's permanent impairment. See Jones v. Genco, Inc., 21 BRBS 12, 15(1988). The date of permanency may not be based on the mere speculation of a physician. Steig v. Lockheed Shipbuilding & Constr. Co., 3 BRBS 439, 441 (1976). In the absence of any other relevant evidence, the judge may use the date the claim was filed. Whyte v. General Dynamics Corp., 8 BRBS 706, 708(1978).

This Court finds that Claimant reached maximum medical improvement (MMI) on September 24, 1998. Dr. Howard Finkel, Claimant's treating physician, testified that Claimant reached MMI on the aforementioned date, his last visit to Dr Finkel following his back surgery. Dr. Finkel treated Claimant from July 21, 1997 until the MMI date. Because this Court gives great weight to the testimony of Claimant's treating physician and because Respondent has not provided evidence in opposition, this Court finds that Claimant reached MMI on September 24, 1998. Therefore, Claimant's disability became permanent partial as of September 24, 1998. Because Claimant reached MMI on September 24, 1998 any disability prior to this date will be considered temporary and any disability post this date will be considered permanent.

III. Nature and Extent of Disability

Disability under the Act means "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. §902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to either have no loss of wage earning capacity, a total loss, or a partial loss. The employee has the initial burden of proving total disability.

To establish a prima facie case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). It is not necessary that the work related injury be the sole cause of the claimant's disability. Therefore, when

an injury accelerates, aggravates, or combines with the previous disability, the entire resulting disability is compensable. Independent Stevedore Co. v. Alerie, 357 F.2d 812 (9th Cir. 1966).

In the instant case, Claimant has established that he cannot continue to perform the jobs he performed prior to his injury. Although Claimant can maintain driving a truck, the credible testimony of Jesse Revis, president of the International Longshoremen of Houston, Local 24, maintaining that there are no longer any light duty jobs on the waterfront; the testimony of Claimant's treating physician establishing Claimant's limitations with a 15%-23% impairment; and the testimony of Claimant himself establish that Claimant can no longer maintain pre-injury employment. Respondent's vocational rehabilitation specialist, Ms. McQuade-Johnson, testified that there are jobs on the waterfront less physical than truck driving, however, the testimony of Mr. Revis, president of the longshore union, does not support this supposition. This Court finds more credible Mr. Revis' testimony as to what each position entails as Mr. Revis personally has worked in all capacities on the waterfront. Furthermore, Claimant's unsuccessful attempts to perform work he performed prior to his injury or the performance of such work with the assistance of co-workers does not preclude a finding of total disability. Thus, this Court finds that Claimant is temporarily totally disabled as of his June 27, 1997 accident.

Suitable Alternative Employment / Partial Disability

Total disability becomes partial on the earliest date that the employer establishes suitable alternative employment. Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

This Court finds that suitable alternative employment was established when Claimant returned to work at the port on June 29, 1998, therein, Claimant's disability is deemed partial as of that date.

IV. Necessary and Reasonable Medical Expenses

Section 7(a) of the Act provides that:

> (a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require.

33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th cir. 1981), aff'g 12 BRBS 65 (1980).

This Court finds that medical expenses related to Claimant's June 27, 1997 injury are both reasonable and necessary. The testimony of Dr. Howard Z. Finkel, Claimant's treating physician, and extensive diagnostic testing establish the necessity of the medical treatment administered and the reasonableness of charges incurred. Additionally, Respondent has introduced no evidence to refute the reasonableness or necessity of Claimant's medical treatment. Therefore, this Court holds that Claimant's medical expenses are reasonable and necessary and are, therefore, compensable.

V. Average Weekly Wage

The parties have stipulated that Claimant's average weekly wage is $1,212.25.

VI. Loss of Wage Earning Capacity

Under Section 8(c)(21) of the Act, compensation in all other cases in the class of disability is sixty-six and two-thirds percent of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability. 33 U.S.C. § 908(c)(21). Section 8(h) of the Act provides that post injury wage earning capacity shall be determined by Claimant's actual earnings if such actual earnings fairly and reasonably represent his wage earning capacity. 33 U.S.C. § 908(h). When a claimant has a physical impairment from the injury but is doing his usual work adequately, regularly, full-time, and without due help, the judge may find that the employee's actual wages fairly represent his wage-earning capacity, and he has suffered no loss and therefore is not disabled. 33 U.S.C. § 908(h); Del Vacchio v. Sun Shipbuilding & Dry Dock Co., 16 BRBS 190, 194 (1984). The party contending that Claimant's actual wages do not fairly and reasonably represent Claimant's wage earning capacity bears the burden of proof in establishing an alternative reasonable wage earning capacity. See Grage v. J.M. Martinac Shipbuilding,21 BRBS 66, 69 (1988); Devillier v. National Steel and Shipbuilding, 10 BRBS 649, 660 (1979); Bolduc v. General Dynamics Corp., 9 BRBS 851, 852 (1979).

Statutory factors itemized in Section 8(h) to be considered in determining wage earning capacity include, in addition to actual post injury wages, the nature of Claimant's injury, the degree

of physical impairment suffered by Claimant, his usual employment, and any further factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of the disability as it may naturally extend into the future. 33 U.S.C. § 908(h). Furthermore, other factors which are taken into consideration are claimant's physical condition, age, education, industrial history, and the availability of employment which he can perform after the injury. The ultimate objective in determining wage earning capacity is to determine the wage that would have been paid in the open market under normal employment conditions to the claimant as injured. Devillier v. National Steel and Shipbuilding, 10 BRBS 649, 660 (1979).

Claimant argues that his actual post injury wages and, therefore, his wage earning capacity should be based on his earnings submitted at the formal hearing which include wages earned from June 29, 1998 through July 22, 1998. However, this Court finds that Claimant's actual wages earned from June 29, 1998 through December 28, 1998 more fairly and reasonably represent Claimant's wage earning capacity. Based on the June-December wage records Claimant earned a post-injury average weekly wage of $779.35 ($20, 263.21÷26 weeks). Because Claimant had a pre-injury average weekly wage of $1.212.25, Claimant has sustained an average loss of $432.90 per week. Thus, this Court finds that Claimant has sustained a loss of wage earning capacity of $432.90 per week.

VII. Section 8(f) Relief

Section 8(f) shifts part of the liability for permanent partial and permanent total disability, and death benefits, from the employer to the Special Fund established by Section 44, when the disability or death is not due solely to the injury which is the subject of the claim. The essential elements of Section 8(f) are met, and an employer's liability is limited to 104 weeks of compensation, if the record establishes that: (1) the employee had a pre-existing partial disability, (2) the partial disability was manifest to the employer, and (3) that it rendered the second injury more serious than it otherwise would have been. Director, OWCP v. Berkstresser, 921 F.2d 306, 309, 24 BRBS 69 (CRT) (D.C. Cir. 1990), rev'g 16 BRBS 231 (1984), 22 BRBS 280 (1989).

Employer argues that if Claimant is permanently disabled, then Claimant's disability is not due solely to his June 27, 1997 injury. Employer argues that Claimant has had several prior injuries including injuries to his back which constitute a permanent partial disability for the purposes of Section 8(f).

The test of whether a pre-existing condition constitutes a permanent partial disability under Section 8(f) is whether it is sufficiently serious and lasting so as to motivate a cautious employer to discharge the employee because of a greatly increased risk of employment-related accident and compensation liability. C&P Telephone Co. v. Director, OWCP, 564 F.2d 503, 513 (D.C. Cir. 1977). As the Board has stated: "medical records need not indicate the precise nature or severity of a pre-existing condition in order to satisfy the pre-existing permanent partial disability requirement of Section 8(f), so long as there is sufficient information to establish the existence of a serious lasting physical problem prior to the subsequent injury". Shrout v. General Dynamics, Corp., 27 BRBS 160, 167 (1993).

Claimant did sustain injuries to his lower back in a 1990 accident which were diagnosed as a low back sprain and contusion by Dr. Gerald Litel. Additionally, Claimant suffered an injury to his lower back in a 1986 accident. Dr. Litel notes that in MRIs related to both the 1986 and the 1990 accident revealed a small bulging at the L4-5 level. However, on a CT scan and a lumbar myelogram performed subsequently on March 15 1992, Claimant exhibited no such abnormality wherein Dr. Litel stated that the test were "normal." Therefore, Claimant did not manifest a "serious lasting physical problem" prior to his 1997 injury. Therein, Respondent has not met the first test for Section 8(f) relief.

The second element in establishing entitlement to Section 8(f) relief is that the pre-existing condition was manifest to the Employer prior to the second injury. It is not necessary that the pre-existing condition be known to the employer as long as it was objectively determinable from the medical records. Highsmith v. Newport New Shipbuilding, 26 BRBS 444, 454 (ALJ) (1992); Delinski v. Pragnot Air-Flex Corp., 9 BRBS 206 (1978), aff'd sub nom. Director, OWCP v. Brandt Air-Flex Corp., 645 F.2d 1053 (D.C. Cir. 1981).

In the instant case, because Claimant's prior injuries were objectively determinable from the Marine Index Bureau report Claimant's prior injuries were manifest. Therefore, Respondent has met the second element for Section 8(f) relief.

The third element is whether the initial injury rendered the second injury more serious that it otherwise would have been. In cases of permanent total and permanent partial disability there are additional requirements which must be met. First, there must be a new injury or aggravation. Second, the disability must not be due solely to the new injury. The employer must show that the second injury by itself would not have led to total disability. Two "R" Drilling Co. v. Director, OWCP, 894 F.2d 748, 750, 23 BRBS 34 (CRT)(5th Cir. 1990). In cases of permanent total or permanent partial disability there are additional requirements. First, there must be a new injury. Second, the disability must not be due solely to the new injury. In addition, there is an additional requirement in cases of permanent partial disability. In those cases, the disability must be materially and substantially greater than that which would have resulted from the new injury alone. Jacksonville Shipyards v. Director, OWCP, 851 F.2d 1314, 1316-1317 (11th Cir. 1988); Director v. Newport News Shipbuilding & Dry Dock Co., 8 F.3d 175 (4th Cir. 1993).

In the case sub judice, Claimant did sustain a new injury. However, there is no evidence to establish that the disability is due to anything other than Claimant's June 27, 1997 accident. Additionally, medical testimony by both Dr. Litel, stating that Claimant's tests in 1992 were negative for continuing back injury, and Dr. Pennington, stating that Claimant's surgery was secondary to his June 27, 1997 accident particularly in light of the discovery of a "free extruded disc fragment", establish that Claimant's injury could not have been materially and substantially greater because of his prior injuries. Therefore, Respondent has not met the additional requirement for Section 8(f) relief where Claimant has currently been found to be permanently partially disabled and, resultingly, has not met the third element for Section 8(f) relief.

Thus, this Court holds that because there is no credible evidence that Claimant's permanent partial disability is not due solely to his June 27, 1997 injury and because Claimant's permanent partial disability is not materially and substantially greater because of Claimant's prior injuries, Respondent is not entitled to Section 8(f) relief.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from June 27, 1997, until June 28, 1998 based on an average weekly wage of $1,212.25.

(2) Employer/Carrier shall pay to Claimant compensation for temporary partial disability benefits from June 29, 1998 until September 24, 1998, the date of maximum medical improvement based on a wage earning capacity of $779.35 per week and his average weekly wage of $1,2112.35.

(3) Employer/Carrier shall pay to Claimant compensation for permanent partial disability benefits from September 24, 1998, and continuing based on a wage earning capacity of $779.35 per week and his average weekly wage of $1,212.25.

(4) Employer/Carrier shall pay to Claimant interest on any unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the auction of 52 week United States Treasury bills as of the date of this decision and order is filed with the District Director. See 28 U.S.C. §1961.

(5) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant.

(6) Employer/Carrier shall pay or reimburse Claimant for reasonable medical expenses, with interest in accordance with Section 1961, which resulted from the injury. See 33 U.S.C. §907.

(7) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have twenty (20) days from receipt of the fee petition in which to file a response.

Entered this ____ day of _____, 1999, at Metairie, Louisiana.

_____
JAMES W. KERR, JR.
Administrative Law Judge

JWK/cmh